



OFFICE OF THE POLICE COMMISSIONER
ONE POLICE PLAZA • ROOM 1400

December 6, 2017

Memorandum for: Deputy Commissioner Trials

Re: **Police Officer Andy Mitchell**
Tax Registry No. 943576
Police Service Area 9
Disciplinary Case No. 2016-15629

The above named member of the service appeared before the Court on September 26, 2017, charged with the following:

DISCIPLINARY CASE NO. 2016-15629

1. Said Police Officer Andy Mitchell, assigned to the Queens Court Section, on or about April 12, 2016, at a Home Depot located in the confines of Kings County, did wrongfully engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Police Officer did steal a lock cylinder.

P.G. 203-10, Page 1, Paragraph 5

**GENERAL REGULATIONS
PUBLIC CONTACT –
PROHIBITED CONDUCT**

2. Said Police Officer Andy Mitchell, assigned to the Queens Court Section, on or about April 12, 2016, at a Home Depot located in the confines of Kings County, did wrongfully engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Police Officer did possess stolen property.

P.G. 203-10, Page 1, Paragraph 5

**GENERAL REGULATIONS
PUBLIC CONTACT –
PROHIBITED CONDUCT**

In a Memorandum dated October 30, 2017, Assistant Deputy Commissioner Jeff S. Adler found Police Officer Andy Mitchell Guilty of both Specifications in Disciplinary Case No. 2016-15629. Having read the Memorandum and analyzed the facts of this matter, I approve the findings, but disapprove the penalty.

I have considered the totality of the circumstances and issues in the misconduct for which Police Officer Mitchell has been found Guilty of and deem that separation from the Department is warranted. However, instead of an outright dismissal from the Department, I will permit an alternative manner of separation from the Department for Police Officer Mitchell at this time.

It is therefore directed that an *immediate* post-trial negotiated agreement be implemented with Police Officer Mitchell in which he shall immediately file for vested-interest retirement, forfeit thirty (30) suspension days (previously served), an additional thirty (30) suspension days (to be served), waive all time and leave balances, including terminal leave, and waive all suspension days, with and without pay, if any, and be placed on one (1) year dismissal probation.

Such vested-interest retirement shall also include Police Officer Mitchell's written agreement to not initiate administrative applications or judicial proceedings against the New York City Police Department to seek reinstatement or return to the Department. If Police Officer Mitchell does not agree to the terms of this vested-interest retirement agreement as noted, this Office is to be notified without delay. This agreement is to be implemented ***IMMEDIATELY***.


James P. O'Neill
Police Commissioner



POLICE DEPARTMENT

October 30, 2017

-----X
In the Matter of the Charges and Specifications : Case No.
- against - : 2016-15629
Police Officer Andy Mitchell :
Tax Registry No. 943576 :
Police Service Area 9 :
-----X

At: Police Headquarters
One Police Plaza
New York, New York 10038

Before: Honorable Jeff S. Adler
Assistant Deputy Commissioner Trials

APPEARANCES:

For the Department: Jamie Moran, Esq.
Department Advocate's Office
One Police Plaza
New York, NY 10038

For the Respondent: Stephen L. Drummond, Esq.
Drummond & Squillace, PLLC
175-61 Hillside Avenue, Suite 205
Jamaica, NY 11432

To:

HONORABLE JAMES P. O'NEILL
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

COURTESY • PROFESSIONALISM • RESPECT

Charges and Specifications:

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P.G. 203-10, Page 1, Paragraph 5 - GENERAL REGULATIONS PUBLIC CONTACT—PROHIBITED CONDUCT

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P.G. 203-10, Page 1, Paragraph 5 - GENERAL REGULATIONS PUBLIC CONTACT—PROHIBITED CONDUCT

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on September 26, 2017. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The Department called Nigel Robinson as a witness, and presented video footage of the incident. Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, I find Respondent Guilty of the charged misconduct.

FINDINGS AND ANALYSIS

This case involves an allegation that Respondent shoplifted from a Home Depot store in Brooklyn on April 12, 2016. Specifically, Respondent is accused of taking a lock cylinder from the location without paying for it. The Department relies primarily on the

testimony of the store's loss prevention agent, Nigel Robinson, as well as videotape footage from four different store cameras.

Robinson testified that he works for Home Depot as an unarmed, undercover agent looking for potential shoplifters. He initially noticed Respondent in the lock aisle, asking a store associate about a lock cylinder, or "core." Robinson overheard Respondent being told by the associate that the cylinder was not sold separately, and that he would have to purchase the entire lock set. Respondent answered that the lock set was too expensive. Based on hearing this conversation, Robinson decided to keep an eye on Respondent. (Tr. 17-20, 88-90, 126-127)

Robinson followed as Respondent pushed a shopping cart containing the lock set and a package of garbage bags to the tool aisle, where he selected a screwdriver, and then proceeded to the paint section. There, Respondent placed the lock set package on top of a "flat cart," which can be used as a table platform. Respondent then opened the package, and utilized the screwdriver to unscrew the lock cylinder. Robinson initially testified that he made these observations from a distance of nine feet, though he later clarified that at the point where Respondent was actually removing the cylinder, Robinson was standing just two feet away. (Tr. 21-23, 118)

Based on these observations, Robinson alerted the store's armed security officer that they had a potential shoplift. Robinson testified that he then watched as Respondent pushed his cart to the self-checkout, where Respondent, with the cylinder in his hand, left the remainder of the lock set package in his cart and paid only for the garbage bags. Respondent then walked away from the checkout carrying the lock cylinder under the garbage bags, displayed his receipt to a security guard at the exit, and headed out of the

store. Robinson testified that he and the armed security guard stopped Respondent, had Respondent hand back the lock cylinder, and escorted him to the loss prevention office at the rear of the store to fill out paperwork. Respondent, who was cooperative, asked if he was going to be arrested, and Robinson told him that he could not yet make that decision. On the way to the office, Respondent asked if he could just pay for the lock now, but Robinson told him it was too late for that. (Tr. 24-27, 101)

Inside the security office, Robinson had Respondent empty his pockets, which contained his wallet, some change, keys, and another lock cylinder that Respondent had brought with him from home in order to compare with the store locks. Robinson had a colleague retrieve the lock set package from Respondent's shopping cart. Robinson testified that he noticed the keys that came with the stolen lock cylinder were missing from the package, and so he tried two of the keys recovered from Respondent on the lock and determined that they were a match. Robinson then placed the stolen cylinder back into the packaging, along with the cylinder that Respondent brought to the store, and took a photograph (Dept. Ex. 5), though the keys are not shown in this photograph. (Tr. 29-32, 62-70, 74, 108, 112) Robinson also acknowledged that in the "Apprehension Report" (Resp. Ex. A) he filled out on the day of the incident, he listed only the "lock set" on the list of stolen property, without any specific reference to the keys. Similarly, the keys were omitted from a supporting deposition filled out by Robinson. (Tr. 72, 83, 86, 93, 98-100, 115)

After having Respondent empty his pockets, Robinson explained to Respondent that they needed to take care of some paperwork. Respondent said fine, and told Robinson that he needed to get out of there as quickly as possible in order to pick up his

sons from school. Robinson gave Respondent the option to sign a "trespass notice" (Dept. Ex. 1), forbidding him from entering the premises for one year. Robinson also asked Respondent if he would read and sign a "voluntary statement" (Dept. Ex. 2), which listed the lock core beneath the following statement: "I admit that on 4/12/16, I knowingly took from Home Depot the following merchandise without making payment and with the intention to deprive Home Depot of its right in the merchandise." In a report prepared by Robinson on the date of the incident (Resp. Ex. C), he indicated that Respondent read and signed each of the forms, and Respondent's signature does appear on each document. (Tr. 31, 36-40, 102-103, 117, 121-124)

Robinson testified that he then had a colleague check on the price of the lock set, and determined that it was valued at roughly \$100. Since the value exceeded \$25, Robinson contacted the police, who arrived at the store. The first time Respondent identified himself as a member of service was when the officers arrived [REDACTED] initially, he had claimed he was a teacher. (Tr. 26, 43, 104-105, 131)

Video footage from four store cameras shows different portions of the incident (Dept. Ex. 4). In the footage entitled "Camera 0002," Respondent, dressed all in grey, is seen in the paint section, standing next to a flat cart. At about 11:56:31, Robinson, wearing a bubble jacket, beige cargo pants, and a hat, is standing within a couple of feet as Respondent appears to be doing something with a package on the cart; Robinson testified that this was the point where he observed Respondent unscrewing the lock cylinder from the lock set. The footage entitled "Self-checkout" is an overhead view showing Respondent pushing his cart to the self-checkout machine at 11:58:08. Respondent removes the package of garbage bags from his cart, and leaves his cart

behind with an item remaining in it; Robinson testified that the item still in the shopping cart was the lock set package, minus the cylinder. At 11:58:21, Respondent scans the package of garbage bags, then places it on the counter as he proceeds to pay for the item. Respondent appears to be holding an object in his left hand, which Robinson testified was the cylinder that Respondent had removed from the lock set. The footage entitled "Front End Racetrack" shows Respondent approach the self-checkout from a different perspective. In the "Customer Exit" footage, Respondent walks toward the exit and shows his receipt to the guard at 11:59:27. Respondent appears to be holding the cylinder in his left hand, underneath the package of garbage bags. About thirty seconds later, Respondent is seen walking back inside the store, escorted by Robinson and a security officer. (Tr. 51-62, 118)

Respondent testified that about 10 days before this incident, he was the victim of a domestic dispute [REDACTED]

[REDACTED]
[REDACTED]. Respondent, meanwhile, was modified and transferred to a different command, which made it difficult to fulfill his responsibilities to his children. Photos of the family were introduced as Resp. Ex. D. (Tr. 136, 141-144, 176)

According to Respondent, the [REDACTED] affected his mindset in the days that followed, including the date of the Home Depot incident. Respondent claimed he had only partial recall as to the details of what occurred. At his Department interview on October 21, 2016, he stated that all he remembered was the guy in the back room telling him to sign something banning him from Home Depot, and the cops coming

to arrest him. He also recalled purchasing the garbage bags with his credit card. When asked about picking up a lock set, Respondent answered, "I don't remember that at all." Respondent testified that as a result of being repeatedly questioned about the incident, he began to believe that maybe he did steal the cylinder. Later, with the help of a [REDACTED] and from watching the video footage, he was able to remember more of the details of what transpired, and realize he wasn't guilty. But to this day, his memory of what happened remains vague. (Tr. 153, 166-170, 173, 183-187, 198-199, 202)

Respondent testified that there was debris at his home from construction, and so he went to Home Depot in order to purchase garbage bags. He also wanted to replace a broken lock cylinder, and so he brought the broken tumbler to the store with the hope of finding the identical brand as a replacement. (Tr. 144-146, 151, 205-206) Respondent testified that he did not speak with any Home Depot sales associate during his visit to the store. He looked at several locks, none were a match for what he needed, and so he purchased only the garbage bags. When he was stopped by Robinson and brought to the back of the store, Respondent possessed only the garbage bags and the tumbler he had brought from home. He did not possess the cylinder or the keys from the store lock set. (Tr. 152-155, 161, 199)

In the security office, Respondent asked Robinson how long he would be there, since he was in a hurry to go pick up his children. Robinson answered that it would be quick, that Respondent just needed to sign some papers and he'd be on his way. Respondent testified that since his priority was to get out of the store as quickly as possible in order to get his kids, he signed the trespass form (Dept. Ex. 1) as well as the voluntary statement admitting to stealing the cylinder (Dept. Ex. 2), without reading

either document. (Tr. 156-159) [REDACTED]

[REDACTED]

[REDACTED]

Respondent is charged with stealing the lock cylinder and possessing the stolen property at the time he was stopped by security. The primary evidence against Respondent is the testimony of Robinson. In attacking the witness' credibility, counsel for Respondent suggests that Robinson fabricated some of the details of what actually transpired. Counsel points to omissions from his paperwork regarding the recovery of the keys. Similarly, when interviewed by Brooklyn North Investigations the day of the incident, Robinson did not mention the keys or the conversation he overheard between Respondent and the store associate. However, the paperwork did list the essential item stolen, the cylinder, and so the omission of the keys is not as significant as counsel suggests. Also, a review of the brief interview by Investigations (Respondent Ex. B) reveals that it was far from an extensive inquiry into all of the details of what occurred, and so the absence of certain specifics does not discredit the entire account.

Moreover, Robinson came across as forthright and sincere as a witness, had no motive to fabricate evidence against Respondent, and I credit his description of what transpired. Robinson's testimony that Respondent stole the cylinder was corroborated by the signed admission by Respondent. Respondent claimed that he only signed this admission because he was in a hurry to get his kids, but it strains credulity to believe that a trained and experienced police officer would so willingly sign an admission to committing a crime of which he was truly innocent. Additionally, the video footage

confirms that Robinson was shadowing Respondent for an extended period of time, keeping an eye on his movements throughout the store. At the point where Respondent removes the cylinder from the package, Robinson appears to be standing within a couple of feet, in position to see what Respondent was doing.

As such, the credible evidence has established that Respondent did steal a lock cylinder from Home Depot, and that he possessed the stolen property when he was stopped by security as he was leaving the store. Nothing in Respondent's testimony persuades me to the contrary. As the Department Advocate noted, Respondent made a series of deliberate, calculated decisions to accomplish the theft of the merchandise. He brought his own tumbler to the store for comparison purposes. When he learned that the item was not sold separately, Respondent removed the cylinder he wanted from the package. He paid only for the garbage bags, then headed for the exit with the stolen cylinder in his hand. Based on the totality of these circumstances, I find Respondent guilty of Specifications 1 and 2.

PENALTY RECOMMENDATION

In order to determine an appropriate penalty, Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 NY 2d 222 (1974). Respondent was appointed to the Department on January 10, 2007. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

The Department Advocate has requested that Respondent be dismissed from the Department. Based upon the record before me, I concur in that recommendation.

On the one hand, this tribunal is mindful of Respondent's strong evaluations during his tenure with the Department, as elicited during his testimony. From 2008 until 2015, Respondent received 4.0 or better on seven consecutive annual evaluations, including high marks in the areas of police ethics and integrity, problem recognition, and judgment. Respondent, a [REDACTED], also made efforts to obtain help for his stress by [REDACTED], though he has not pursued such assistance for several weeks.

However, Respondent's conduct on April 12, 2016 is extremely troubling: he deliberately stole a lock cylinder from a Home Depot store. Such behavior undermines the high level of integrity expected of members of the Department, which is why similar conduct has resulted in separation from the Department for the offending parties. For instance, in *Disciplinary Case No. 15687/16* (May 4, 2017), an 18-year officer with no formal disciplinary history, was dismissed from the Department for stealing \$20. In *Disciplinary Case No. 12548/14* (Dec. 22, 2015), a nine-year officer with no disciplinary history was dismissed from the Department for stealing merchandise from a Target store.

Respondent's misconduct here was egregious, and warrants separation from the Department as well. Taking into account the totality of circumstances in this matter, I recommend that Respondent be DISMISSED from the New York City Police Department.

Respectfully submitted,



Jeff S. Adler
Assistant Deputy Commissioner Trials





POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER ANDY MITCHELL
TAX REGISTRY NO. 943576
DISCIPLINARY CASE NO. 2016-15629

Respondent was appointed to the Department on January 10, 2007.

On his last three annual performance evaluations, Respondent twice received overall ratings of 4.5 "Extremely Competent/Highly Competent" in 2015 and 2014, and an overall rating of 3.0 "Competent" in 2016. Respondent was awarded one medal for Excellent Police Duty.

On April 12, 2016, Respondent was suspended for the instant occurrence. On May 12, 2016, Respondent was modified, which remains ongoing. On September 12, 2016, Respondent was placed on Level 2 Discipline Monitoring in connection with this case; that monitoring remains ongoing.

Respondent has no formal disciplinary history.

For your consideration.

Jeff S. Adler
Assistant Deputy Commissioner Trials